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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
5

6 ANGELA M. LORELLO,

7 Plaintiff,

8 vs.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

No. 11-cv-455-JPH

**ORDER ON SUMMARY  
JUDGMENT**

12 BEFORE THE COURT are cross-motions for summary judgment. ECF No.  
13 16, 18. The parties have consented to proceed before a magistrate judge. ECF No.  
14 23. After reviewing the administrative record and the parties' briefs, the court  
15 **grants** defendant's motion for summary judgment, **ECF No. 18**.

**JURISDICTION**

16 Lorello applied for supplemental security income (SSI) benefits on July 19,  
17 2010. She alleged disability beginning November 10, 2009 (Tr. 163-69). Benefits  
18 were denied initially and on reconsideration (Tr. 96-99, 103-05). ALJ Marie  
19 Palachuk held a hearing on May 4, 2011 (Tr. 40-93) and issued an unfavorable  
decision May 20, 2011 (Tr. 20-32). On November 18, 2011 the Appeals Council  
denied review (Tr. 1-4). The matter is now before the Court pursuant to 42 U.S.C.

1 § 405(g). Plaintiff filed this action for judicial review on December 14, 2011. ECF  
2 No. 1, 4.

### 3 **STATEMENT OF FACTS**

4 The facts have been presented in the administrative hearing transcript, the  
5 ALJ's decision and the briefs of the parties. They are only briefly summarized as  
6 necessary to explain the court's decision.

7 Lorello was 24 years old when she applied for benefits. She earned a GED  
8 and has attended college. She has no past work at SGA levels but has worked with  
9 her mother as a house cleaner "under the table." She has also worked as a  
10 restaurant hostess and banquet server. Her longest job was working at a restaurant  
11 for one year. She alleges disability based on physical and mental limitations (Tr.  
12 30, 72, 81, 180, 242, 347, 397). At the time of the hearing Lorello was receiving  
13 in-patient substance abuse treatment (Tr. 73). She testified that when she is not in  
14 a treatment facility she likes to go to the mall, shop and hang out with friends (Tr.  
15 77). The longest she has been clean is 3-4 months (Tr. 78). She suffers side effects  
16 from the psychotropic drugs prescribed for mental disorders (Tr. 207).

### 17 **SEQUENTIAL EVALUATION PROCESS**

18 The Social Security Act (the Act) defines disability as the "inability to  
19 engage in any substantial gainful activity by reason of any medically determinable  
physical or mental impairment which can be expected to result in death or which  
has lasted or can be expected to last for a continuous period of not less than twelve  
months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
plaintiff shall be determined to be under a disability only if any impairments are of  
such severity that a plaintiff is not only unable to do previous work but cannot,  
considering plaintiff's age, education and work experiences, engage in any other  
substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both

1 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
2 (9<sup>th</sup> Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process  
4 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
5 one determines if the person is engaged in substantial gainful activities. If so,  
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
7 decision maker proceeds to step two, which determines whether plaintiff has a  
8 medically severe impairment or combination of impairments. 20 C.F.R. §§  
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe  
10 impairment or combination of impairments, the disability claim is denied.

11 If the impairment is severe, the evaluation proceeds to the third step, which  
12 compares plaintiff's impairment with a number of listed impairments  
13 acknowledged by the Commissioner to be so severe as to preclude substantial  
14 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
15 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
16 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
17 not one conclusively presumed to be disabling, the evaluation proceeds to the  
18 fourth step, which determines whether the impairment prevents plaintiff from  
19 performing work which was performed in the past. If a plaintiff is able to perform  
previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
(RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
final step in the process determines whether plaintiff is able to perform other work  
in the national economy in view of plaintiff's residual functional capacity, age,  
education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
2 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
3 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
4 met once plaintiff establishes that a physical or mental impairment prevents the  
5 performance of previous work. The burden then shifts, at step five, to the  
6 Commissioner to show that (1) plaintiff can perform other substantial gainful  
7 activity and (2) a “significant number of jobs exist in the national economy” which  
8 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

9 Plaintiff has the burden of showing that drug and alcohol addiction (DAA) is  
10 not a contributing factor material to disability. *Ball v. Massanari*, 254 F.3d 817,  
11 823 (9<sup>th</sup> Cir. 2001). The Social Security Act bars payment of benefits when drug  
12 addiction and/or alcoholism is a contributing factor material to a disability claim.  
13 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d  
14 949 (9<sup>th</sup> Cir. 2001); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If  
15 there is evidence of DAA and the individual succeeds in proving disability, the  
16 Commissioner must determine whether DAA is material to the determination of  
17 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds that the claimant is  
18 not disabled, then the claimant is not entitled to benefits and there is no need to  
19 proceed the analysis to determine whether substance abuse is a contributing factor  
20 material to disability. However, if the ALJ finds that the claimant is disabled, then  
21 the ALJ must proceed to determine if the claimant would be disabled if he or she  
22 stopped using alcohol or drugs.

### 23 STANDARD OF REVIEW

24 Congress has provided a limited scope of judicial review of a  
25 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the  
26 Commissioner’s decision, made through an ALJ, when the determination is not  
27 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,

1 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
2 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be  
3 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*  
4 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial  
5 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
6 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
7 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence  
8 as a reasonable mind might accept as adequate to support a conclusion.”  
9 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch  
10 inferences and conclusions as the [Commissioner] may reasonably draw from the  
11 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.  
12 1965). On review, the Court considers the record as a whole, not just the evidence  
13 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
14 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980).

15 It is the role of the trier of fact, not this Court, to resolve conflicts in  
16 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
17 interpretation, the Court may not substitute its judgment for that of the  
18 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
19 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
set aside if the proper legal standards were not applied in weighing the evidence  
and making the decision. *Browner v. Secretary of Health and Human Services*,  
839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support  
the administrative findings, or if there is conflicting evidence that will support a  
finding of either disability or nondisability, the finding of the Commissioner is  
conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

### ALJ’S FINDINGS

At step one ALJ Palachuk found Lorello did not work at SGA levels after

1 she applied for benefits (Tr. 22). At steps two and three, the ALJ found Lorello  
2 suffers from Crohn's disease with ileostomy, history of rectal cancer currently in  
3 remission, history of asthma, polysubstance abuse, and substance induced mood  
4 disorder vs. bipolar disorder, impairments that are severe and meet Listings 12.04  
5 and 12.09 when DAA is included (Tr. 22, 27). Absent DAA, the ALJ found  
6 Lorello's impairments are severe but do not meet or equal a Listed impairment (Tr.  
7 27). She found Lorello can perform light work with nonexertional limitations (Tr.  
8 28). As noted, Lorello has no past relevant work. At step five, the ALJ found  
9 Lorello can perform work as a housecleaner (Tr. 30, 32). The ALJ found DAA is a  
10 contributing factor material to disability. Accordingly, the ALJ found Lorello has  
11 not been disabled since she applied for benefits on July 19, 2010 (Tr. 32).

### 12 ISSUES

13 Lorello alleges the ALJ improperly weighed the medical evidence and  
14 should have found that she would be disabled even when DAA is excluded. ECF  
15 No. 17 at 13-19. The Commissioner responds that the ALJ properly weighed the  
16 evidence and asks the Court to affirm. ECF No. 19 at 6-7.

### 17 DISCUSSION

18 Lorello alleges the ALJ should have given greater weight to the opinions of  
19 Harvey Alpern, M.D, Ethan Angell, M.D., and John Arnold, Ph.D., ECF No. 17 at  
14-19. The Commissioner responds that the ALJ properly weighed the evidence,  
including the effects of DAA. ECF No. 19 at 5-7.

#### 20 *Credibility*

21 To aid in weighing the conflicting medical evidence, the ALJ evaluated  
22 Lorello's credibility, and found her less than fully credible. Credibility  
23 determinations bear on evaluations of medical evidence when an ALJ is presented  
24 with conflicting medical opinions or inconsistency between a claimant's subjective  
25 complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup>

1 Cir. 2005).

2 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
3 *Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be  
4 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup>  
5 Cir. 1990). Once the claimant produces medical evidence of an underlying  
6 impairment, the ALJ may not discredit testimony as to the severity of an  
7 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157  
8 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative evidence of malingering, the  
9 ALJ's reason for rejecting the claimant's testimony must be "clear and  
10 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings  
11 are insufficient: rather the ALJ must identify what testimony is not credible and  
12 what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;  
13 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

14 Lorello does not challenge the ALJ's negative credibility assessment,  
15 making it a verity on appeal. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d  
16 1155, 1161 n. 2 (9<sup>th</sup> Cir. 2008). When hospitalized Lorello has denied drug use but  
17 tested positive for methamphetamine and cocaine. She has been non-compliant  
18 with taking prescribed medications, and with attending group counseling sessions  
19 and treatment, without explanation. She inconsistently explained the reasons she  
left her last job. The job ended because she quit to avoid being fired. She quit  
because she had too few hours. She was fired for missing too much work (Tr. 23,  
29-30; 13F, Tr. 75, 251-52, 256, 280-81, 291-92, 305-09, 318-19, 369, 397, 399,  
472). The ALJ's reasons for her credibility determination are clear, convincing and  
supported by substantial evidence. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup>  
Cir. 2002) (proper to consider inconsistencies in plaintiff's statements); *Burch v.*  
*Barnhart*, 400 F.3d 676, 681 (9<sup>th</sup> Cir. 2005) (proper to consider unexplained failure  
to follow treatment recommendations).



1        *Medical opinions and DAA*

2        Lorello alleges the ALJ misconstrued the opinion of Dr. Alpern, the medical  
3 expert who testified at the hearing. ECF No. 17 at 14-16. After reviewing the  
4 record Dr. Halpern testified:

5        “...[Lorello] was found, in 2006, at about the age of, I guess, 20, to have  
6 rectal carcinoma. That was treated appropriately with chemo and surgery. At the  
7 present time, her gastroenterologist’s records indicate that she has only minimal  
8 symptoms. She still has the ileostomy. She has occasional diarrhea and occasional  
9 abdominal pain from this.

10        ... Because of the presence of the ileostomy ... I would give some work  
11 restrictions. I would limit her to a light residual functional capacity, as well as  
12 restrictions from concentrated, noxious fumes and dust.

13        ... She had occasional bursts of pain and they don’t seem to be frequent  
14 enough to be more – that would require more than one day off a month.” (Tr. 45-  
15 47).

16        Lorello alleges the ALJ erred when she failed to include the need for one  
17 day off each month. Lorello misconstrues the ALJ’s statement with respect to Dr.  
18 Alpern’s testimony. The ALJ stated:

19        “The undersigned has carefully considered Dr. Alpern’s testimony that the  
20 claimant may miss one day of work each month due to flares of her Crohn’s  
21 disease. However, Dr. Alpern testified that the flares would be ‘occasional’ and it  
22 is possible that the one day per month of exacerbation could occur on a weekend.  
23 There is little support in the record that the claimant would in fact actually miss  
24 one day of work every month.” (Tr. 30) (emphasis original).

25        The ALJ properly considered this testimony, along with the rest of the  
26 record. Inferences from the record can constitute substantial evidence, but only  
27 those “reasonably drawn from the record” will suffice. *Widmark v. Barnhart*, 454



1 F.3d 1063, 1066 (9<sup>th</sup> Cir. 2006), citing *Batson v. Comm'r of Soc. Sec. Admin.*, 359  
2 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). The record supports the ALJ's inference. For  
3 example, Dr. Angell assessed an RFC for a range of light work on March 23, 2010.  
4 Testing was within normal limits (Tr. 281-86, 378).

5 *Dr. Angell*

6 Lorello alleges the ALJ failed to properly credit Dr. Angell's opinion that  
7 she would struggle to keep stable employment unless she found work that  
8 permitted significant flexibility. ECF No. 17 at 15-16, citing Tr. 282. The  
9 Commissioner points out that Dr. Angell's opinion included ongoing substance  
10 abuse. ECF No. 19 at 6, citing Tr. 285, 288. Because the ALJ found plaintiff  
11 disabled when DAA is included, Dr. Angell's opinion does not answer the relevant  
12 question: how does Lorello function when DAA is excluded, that is, when she is  
13 clean and sober? The ALJ properly weighed Dr. Angell's opinion when DAA is  
14 included. Lorello fails to show error.

15 *Dr. Arnold*

16 Lorello alleges the ALJ should have given more credit to Dr. Arnold's  
17 opinion as an examining psychologist than to Dr. Klein's, who simply reviewed  
18 the record and testified. ECF No. 17 at 16-19.

19 Dr. Arnold evaluated Lorello on February 26, 2010. Unlike Dr. Klein, he  
had no records to review. He notes that he did not observe mood swings or  
depressive symptoms. He diagnosed bipolar disorder, and cocaine and alcohol  
abuse in early full remission by report. He opined mental health symptoms were  
not affected by DAA, and predate DAA. Dr. Arnold assessed a GAF of 55;  
however, he opined Lorello should be able to work when symptoms stabilize.  
Mental health was required for stabilization and Lorello was not currently  
receiving such treatment (Tr. 262-66).

At intake a month earlier, on January 23, 2010, a counselor assessed a GAF

1 of 65 (Tr. 299) and in April 2010, of 70 (Tr. 290), indicating only mild symptoms  
2 or difficulty functioning, but generally functioning pretty well.

3 Dr. Klein reviewed the record. He opined Lorello may have been clean and  
4 sober for 1-2 months when she was evaluated by Dr. Arnold, as the ALJ observes  
5 (Tr. 30). Dr. Klein testified DAA use was active at least until March 2011, and  
6 Lorello was being treated for DAA at the time of the hearing (Tr. 51-52). He  
7 opined she met listing 12.09 (substance abuse disorder) and 12.04 (drug-induced  
8 mood disorder) when DAA is included (Tr. 51-52, 58). The record supports these  
9 diagnoses. *See* Tr. 293 (counselor considered diagnosis of drug/alcohol induced  
10 mood disorder) and Tr. 475 (treating Dr. Goodell diagnoses substance-induced  
11 mood disorder).

12 When DAA is excluded, Dr. Klein opined Lorello has two moderate  
13 functional limitations: working with the public and accepting criticism from  
14 supervisors (Tr. 59). He opined hospital records show that when Lorello is clean  
15 and sober she does not demonstrate severe mental limitations (Tr. 54-58, 63-68,  
16 504).

17 The record supports Dr. Klein's opinion.

18 Lorello has admitted her mood "felt a lot more stable" when she took  
19 prescribed medication, as the ALJ observes (Tr. 25, referring to September 2010  
report from Spokane Mental Health, at Tr. 463). In October 2010 Lorello again  
reported her mood "has been well-controlled" on medication (Tr. 461-62). In  
February 2011 Lorello is described as "continues to be pleasant and cooperative.  
She is up in the unit interacting with staff and peers. She completes ADL's daily  
without prompting." (Tr. 944). Hospital records in March 2011 show that when  
psychotropic medication was restarted, Lorello's mood steadily increased after the  
first week (Tr. 605).

Although Lorello alleges the ALJ should have weighed the evidence

1 differently, the ALJ is responsible for reviewing the evidence and resolving  
2 conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup>  
3 Cir. 1989). It is the role of the trier of fact, not this court, to resolve conflicts in  
4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
5 interpretation, the Court may not substitute its judgment for that of the  
6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
7 Cir. 1984). If there is substantial evidence to support the administrative findings, or  
8 if there is conflicting evidence that will support a finding of either disability or  
9 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*,  
10 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

11 The ALJ's determinations are supported by the record and free of harmful  
12 legal error. Lorello fails to establish she would be disabled if DAA is excluded.

### 13 CONCLUSION

14 After review the Court finds the ALJ's decision is supported by substantial  
15 evidence and free of harmful legal error.

### 16 IT IS ORDERED:

- 17 1. Defendant's motion for summary judgment, **ECF No. 18**, is **granted**.
- 18 2. Plaintiff's motion for summary judgment, ECF No. 16, is denied.

19 The District Executive is directed to file this Order, provide copies to  
counsel, enter judgment in favor of defendant, and **CLOSE** the file.

DATED this 18th day of June, 2013.

s/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE